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8 **UNITED STATES DISTRICT COURT**

9 **DISTRICT OF NEVADA – NORTHERN DIVISION**

10 THE CINCINNATI SPECIALTY  
UNDERWRITERS INSURANCE COMPANY  
11 Plaintiff.

12 v.

13 RED ROCK HOUNDS, a Domestic Nonprofit  
Cooperative Corporation Without Stock (81);  
14 LYNN LLOYD, individually; AND TRACY  
TURNBOW (Interested Party)  
15 Defendants.

16 RED ROCK HOUNDS, a Domestic Nonprofit  
Cooperative Corporation Without Stock; and  
17 BARBARA LYNN LLOYD,  
18 Counterclaimants,

19 v.

20 THE CINCINNATI SPECIALTY  
UNDERWRITERS INSURANCE COMPANY;  
21 BEEHIVE INSURANCE AGENCY, INC., a  
Utah corporation, doing business as  
22 CERTIFIED INSURANCE SERVICES, INC.,  
23 Counterdefendants.

CASE NO.: 3:20-cv-00272-MMD-BNW

**OPPOSITION TO MOTION TO DISMISS,  
JOINDER THERETO, AND  
ALTERNATIVE MOTION TO STAY  
PROCEEDINGS**

24 Plaintiff THE CINCINNATI SPECIALTY UNDERWRITERS INSURANCE COMPANY  
25 (“CSU”), by and through its attorneys of record, the law firm of LITCHFIELD CAVO LLP, hereby  
26 opposes the Motion to Dismiss [ECF #10] filed by Defendant TRACY TURNBOW (“Turnbow”), the  
27 Joinder filed RED ROCK HOUNDS and LYNN LLOYD (collectively “Red Rock”) [ECF #14], and  
28 the Alternative Motion to Stay Proceedings filed by Red Rock [ECF #15].

## MEMORANDUM OF POINTS AND AUTHORITIES

### I.

#### INTRODUCTION

Plaintiff, CSU is the insurer on a policy for defendant Red Rock. Red Rock has been sued in state court by Turnbow. Turnbow alleges that on or about September 25, 2019, Red Rock owned and operated a facility for horse boarding and training as well as providing lessons for horse riding. Turnbow further alleges that, on that date, she was at Red Rock feeding horses with the express or implied permission of Red Rock and Lynn Lloyd. Allegedly, at that time, a horse belonging to or in the care of Red Rock, known as Indy, suddenly and unexpectedly kicked plaintiff in the back of her skull neck. After Ms. Turnbow fell to the ground, Indy began stomping on her body causing plaintiff further injury. In turn, CSU has filed this action to determine its obligations under the insurance policy with respect to the state court complaint of Turnbow.

### II.

#### LEGAL ARGUMENT

##### **A. CSU Has Amply Stated A Claim for Declaratory Relief Against Red Rock**

In a diversity action, federal law determines whether the parties have presented a controversy ripe for judicial review under the Declaratory Judgment Act. *Hunt v. State Farm Mut. Auto. Ins. Co.*, 655 F.Supp. 284, 286 (D.Nev.1987). State substantive law regarding the parties' rights applies when it is relevant to the Court's ripeness analysis. *Id.*

A federal court may grant declaratory relief "[i]n a case of actual controversy within its jurisdiction...." 28 U.S.C. § 2201(a). Accordingly, a district court must determine at the outset whether the parties have presented an actual case or controversy within the court's jurisdiction. *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 669 (9th Cir.2005). A case or controversy is ripe if the court finds "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127, 127 S.Ct. 764, 166 L.Ed.2d 604 (2007) (quotation omitted). Therefore, a court cannot grant declaratory relief if the dispute between the parties is hypothetical or the rights at issue are merely speculative. *Hunt*, 655 F.Supp. at 286. The parties must present a dispute that is "definite and

1 concrete." *MedImmune*, 549 U.S. at 127, 127 S.Ct. 764 (quotation omitted).

2 Here, there is a ripe, actual, and substantial controversy concerning CSU's obligations to Red  
3 Rock for the allegations asserted against Red Rock in the Turnbow Complaint; specifically, whether  
4 or not CSU must defend Red Rock against the allegations asserted in the Turnbow Complaint and/or  
5 indemnify Red Rock for any potential judgment rendered in the state court action. Accordingly,  
6 declaratory relief is warranted.

7 i. A Ripe and Actual Controversy Exists Between CSU and Red Rock Regarding The  
8 Rights Of Red Rock And The Obligations of CSU Under the Policy

9 Unless an actual controversy exists, the Court is without power to grant declaratory relief. 28  
10 U.S.C. § 2201. The key question is "whether ... there is a substantial controversy, between parties  
11 having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a  
12 declaratory judgment." *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 506, 92 S.Ct. 1749, 1755,  
13 32 L.Ed.2d 257 (1972), quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273,  
14 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941). See also *City of Springfield*, supra at 89. The Court cannot  
15 grant declaratory relief if the asserted controversy involves only future or speculative rights. *County*  
16 *of Santa Barbara v. United States*, 269 F.Supp. 855, 862 (C.D.Cal.1967). Federal constitutional courts  
17 act only on cases and controversies and do not give advisory opinions. *Coffman v. Breeze Corps.*, 323  
18 U.S. 316, 324, 65 S.Ct. 298, 302, 89 L.Ed. 264 (1945); *Pinto v. Tampo Largo*, 205 F.Supp. 129, 132  
19 (S.D.Cal.1962). A case or controversy exists when an insurer seeks a "declaration regarding its duty  
20 to defend and indemnify its insured in a pending state court liability suit." *Am. States Ins. Co. v.*  
21 *Kearns*, 15 F.3d 142, 144 (9th Cir. 1994). Upon finding a case or controversy within the Court's  
22 jurisdiction, it must then decide whether to exercise that jurisdiction. *Id.* District courts "should avoid  
23 needless determination of state law issues," "discourage litigants from filing declaratory actions as a  
24 means of forum shopping," and "avoid duplicative litigation." *Gov't Emps. Ins. Co. v. Dizol*, 133 F.3d  
25 1220, 1225 (9th Cir. 1998) (citing *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 494 (1942)).

26 Under Nevada law, declaratory relief between an insured and his insurer may be granted prior  
27 to a final tort judgment. *El Capitan Club v. Fireman's Fund Ins. Co.*, 89 Nev. 65, (1973). Declaratory  
28 relief is proper between an insured and his insurer once the insured has made a demand for the

1 insurance company to pay a claim or defend a lawsuit. *Knittle v. Progressive Cas. Ins. Co.*, 112 Nev.  
2 8, 908 P.2d 724, 726 (1996). Additionally, declaratory relief between an insured and his insurer may  
3 be proper where it is clear and early resolution of the question of coverage will be advantageous to all  
4 parties. *El Capitan Club*, 506 P.2d at 429.

5 Here, CSU has filed this action seeking a declaration regarding its duty to defend and  
6 indemnify its insured, Red Rock, in the pending state court liability suit initiated by Turnbow. The  
7 declaratory relief action filed by CSU will not require a determination of state law issues. Nor is there  
8 any indication that CSU is forum shopping. Red Rock has demanded that CSU defend it in the state  
9 court lawsuit filed by Turnbow. Pursuant to *Knittle*, this matter is ripe. Declaratory relief is also proper  
10 because it would provide an early resolution of the question of coverage that will be advantageous to  
11 all parties.

12 Accordingly, a ripe case or controversy exists between CSU and Red Rock and this Court  
13 should exercise its jurisdiction in this action regarding whether CSU must defend Red Rock against  
14 the allegations asserted in the Turnbow Complaint and/or indemnify Red Rock for any potential  
15 judgment rendered in the state court action.

16 **B. The Complaint of CSU Contains Detailed Factual Allegations That Provide Fair**  
17 **Notice to Defendants of CSU’s Claims and the Grounds They Rest Upon; The Subject**  
18 **Motion to Dismiss should be Denied.**

19 Under Federal Rule of Civil Procedure 8(a) (2), a complaint must contain a “short and plain  
20 statement of the claim showing that the pleader is entitled to relief.” See *Bell Atl. Corp. v. Twombly*,  
21 550 U.S. 544, 570 (2007). [D]etailed factual allegations” are not required. *Id.* at 55; see also *Erickson*  
22 *v. Pardus*, 551 U.S. 89, 93 (2007) (“[s]pecific facts are not necessary; the statement need only give the  
23 defendant fair notice of what the . . . claim is and the grounds upon which it rests.”). In considering  
24 whether the complaint is sufficient to state a claim, the court will accept “all factual allegations in the  
25 complaint as true and construe the pleadings in the light most favorable to the nonmoving party.” *Rowe*  
26 *v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1029–30 (9th Cir. 2009) (internal quotations marks and  
27 citation omitted). After accepting plaintiff’s factual allegations as true, the Court must then decide  
28 whether plaintiff “state[s] a claim for relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. A

1 claim is facially plausible when the pleaded factual content allows the court to draw the reasonable  
2 inference that the defendant is liable for the misconduct alleged. *Id.* at 556.

3 In considering a motion to dismiss, “all well-pleaded allegations of material fact are taken as  
4 true and construed in a light most favorable to the non-moving party.” *Wylar Summit Partnership v.*  
5 *Turner Broad System. Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). Likewise, there is a strong presumption  
6 against dismissing an action for failure to state a claim. See *Gilligan v. Jamco Dev. Corp.*, 108 F.3d  
7 246, 249 (9th Cir. 1997). The issue is not whether the plaintiff ultimately will prevail, but whether the  
8 plaintiff may offer evidence in support of its claims. *Id.* Consequently, a Court may not grant a motion  
9 to dismiss for failure to state a claim “unless it appears beyond doubt that the Plaintiff can prove no  
10 set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41,  
11 45-46 (1957); see also *Hicks v. Small*, 69 F.3d 967, 969 (9th Cir. 1995).

12 Under these authorities, accepting the allegations of CSU’s Complaint for Declaratory Relief  
13 as true, and considering those allegations in a light most favorable to CSU, CSU submits it has stated  
14 a proper claim for determination of the legal and contractual duties it owes to Red Rock under the  
15 Policy. Again, as detailed above, CSU has plead a short and plain statement that put defendants on  
16 notice of CSU’s claims and the grounds they rest upon. As evidenced by the Opposition of Turnbow  
17 and Joinder thereto, Defendants have notice of and are able to clearly articulate CSU’s claims.  
18 Defendants articulate that CSU “asserts that its insurance policy excludes all claims, including punitive  
19 damages and it has no obligation to defend or indemnify RRH for Mr. Turnbow’s State Court Claims.”  
20 Motion to Dismiss [ECF #10], 2:1-2. Defendants further articulate that “CS[U] makes...statements  
21 that coverage for RRH does not exist and asserts four defenses: 1) the ‘expected or intended injury’  
22 exclusion; 2) the ‘designated operation or work exclusion’; 3) the ‘participant and contestant’  
23 exclusion; and 4) the ‘punitive and exemplary damage’ exclusion.” *Id.* By Defendants own briefing,  
24 Defendants have notice of CSU’s claims.

25 Additionally, the Complaint of CSU contains fourteen separate paragraphs of facts in support  
26 of its claims. Defendants cannot show that “beyond a doubt that [CSU] can prove no set of facts in  
27 support of [her] claim which would entitle him to relief.” Instead Defendants argue that “the facts  
28 alleged in the view of the insurance policy cannot trigger the first three exclusions.” *Id.* However, as

1 stated by the Court in *Gilligan*, “[t]he issue is not whether the plaintiff ultimately will prevail, but  
2 whether the plaintiff may offer evidence in support of its claims.

3 Accordingly, CSU has stated a valid claim for declaratory relief.

#### 4 **C. Disputed Material Facts Preclude Summary Judgment**

5 The Nevada Supreme Court has stated that “[a] trial court may, in its sound discretion, refuse  
6 to grant summary judgment if the motion is made at an early stage of discovery because the court feels  
7 that further development is needed to assist it in its decision.” *Collins v. Union Fed. Sav. & Loan*  
8 *Ass’n*, 99 Nev. 284, 302 (1983) (citing 10 Wright & Miller, Federal Practice & Procedure: Civil § 2728  
9 at 558 (1978)).

10 If the Court treats the Motion to Dismiss as a Motion for Summary Judgment, it must be denied  
11 because it is premature. This action was only recently filed on May 7, 2020. No joint case conference  
12 report has been filed, and discovery has not been opened. All parties haven’t even exchanged  
13 documents. Granting summary judgment now could have unanticipated adverse effects on the parties  
14 to this action. Defendants cited no case law in support of its Motion to Dismiss/ Motion for Summary  
15 Judgment wherein summary judgment was granted at such an early stage in the litigation. This is  
16 probably because, as demonstrated above, the Nevada Supreme Court has repeatedly held that it is  
17 error to grant summary judgment when the parties have not been able to discover sufficient facts to  
18 properly oppose. See *Harrison v. Falcon Prod., Inc.*, 103 Nev. 558, 560 (1987) (granting summary  
19 judgment two years after filing the complaint was an abuse of discretion because the party was unable  
20 to gather information to support her claims and was not dilatory in conducting discovery).

21 Based on the foregoing reasons, Plaintiff’s Motion must be denied so that discovery can be  
22 conducted.

#### 23 **D. A Stay is Not Appropriate**

24 Red Rock requests a stay of these proceedings because there are overlapping issues with the  
25 ongoing state action, they will suffer hardship by being forced to fight two suits, a stay will not  
26 prejudice CSU, and a stay while allowing the underlying action to proceed will simplify issues in this  
27 case. As argued above, declaratory relief may be granted before a final tort judgment. Also, defendants  
28 will not suffer any hardship if a stay is not granted.

1 A district court has the discretionary power to stay proceedings. *Lockyer v. Mirant Corp.*, 398  
 2 F.3d 1098, 1109 (9th Cir. 2005). In determining whether to grant a stay, courts weigh “(1) the possible  
 3 damage that may result from the granting of the stay; (2) the hardship or inequity which a party may  
 4 suffer in being required to go forward; and (3) the orderly course of justice measured in terms of the  
 5 simplification or complication of issues, proof, and question of law ....” *Fed. Ins. Co. v. Holmes Weddle*  
 6 *& Barcott PC*, No. C13-0926JLR, 2014 WL 358419, at \*3 (W.D. Wash. Jan. 31, 2014). The party  
 7 requesting the stay “bears the burden of establishing its need.” *Clinton v. Jones*, 520 U.S. 681, 708  
 8 (1997).

9 The defendants have not met their burden to show a stay is warranted. A finding that the  
 10 exclusion and endorsement apply to the Turnbow action does not preclude a finding in that case that  
 11 the allegations have not been proven. Furthermore, under Nevada law “declaratory relief between an  
 12 insured and his insurer may be granted prior to a final tort judgment.” *Vignola v. Gilman*, 804 F. Supp.  
 13 2d 1072, 1077 (D. Nev. 2011). The fact that the defendants will have to litigate this case and the  
 14 underlying case simultaneously is insufficient to warrant a stay. Neither party has shown that it will  
 15 be unduly prejudiced. Accordingly, the Red Rock’s alternative request for stay of proceedings should  
 16 be denied.

### 17 III.

### 18 CONCLUSION

19 Based on the foregoing, CSU respectfully requests that Defendants’ Motion to Dismiss, the  
 20 Joinder thereto, and the Alternative Request for Stay be denied in their entirety. Alternatively, if  
 21 this Court is inclined to grant Defendants’ Motion, CSU should be given leave to amend.

22 Dated: August 14, 2020

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23 By: 

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**CERTIFICATE OF SERVICE**

I, Hilary Rainey, certify that I am an employee of the law offices of Litchfield Cavo LLP and at all times during the service of process was, not less than 18 years of age and not a party to the matter concerning which service of process was made. I also further certify that the service of the **OPPOSITION TO MOTION TO DISMISS, JOINDER THERETO, AND ALTERNATIVE MOTION TO STAY PROCEEDINGS** was made on the 14<sup>th</sup> day of August, 2020, on all parties in this action, by causing a true copy thereof to be distributed as follows:

X By Notice of Case Management/Electronic Case Filing (CM/ECF) of the United States District Court, District of Nevada, to the individuals and/or entities on the ECF Service List.

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Dated this 14<sup>th</sup> day of August, 2020.

  
Hilary Rainey